of the order by the board. In the circumstances these excess payments have to be worked out under the formula laid down in section 15(b).

For the purpose of ascertaining the excess amount under the formula laid down by section 15(b), all that is necessary to know is the maximum recoverable rent of the whole premises and the proportion which the area of the part sub-let to the plaintiff bears to the area of the whole premises. No evidence was led as to these matters, but there is ample information about them in the notes of proceedings before the Rent Assessment Board. These notes of proceedings were included in the agreed bundle of documents which was put in by consent of the parties and marked as exhibit P.1. The relevant portion from P.1 was read out by counsel for the plaintiff in his opening speech and was referred to again in his final speech. It has been contended by counsel for the defendant that these notes of proceedings cannot be said to be in evidence. I do not agree. In the first place, counsel for the defence did not object to the bundle being marked as an exhibit, and in the second place, the relevant portion was actually read at the trial. They must therefore be taken to be in evidence.

As stated in the notes of proceedings, the parties agreed before the board that the maximum recoverable rent for the whole premises was $167.65 and that the rent for the whole of the ground floor was half the rent for the whole premises, namely, $83.83. The maximum recoverable rent for the whole of the ground floor therefore was $83.83 increased by ten per centum, making a total of $92.21. It was also agreed that the plaintiff occupied two-thirds of the ground floor area, so that the maximum rent payable by him works out at $61.47 (being two-thirds of $92.21). The receipts produced at the trial show that the standard rent for the whole of the premises up to 1954 was $100 *per mensem*. To that sum must have been added certain increases permitted under section 6 of the ordinance so as to make the maximum recoverable rent in 1961 as $167.65. There can be no doubt that the maximum recoverable rent in July 1956 could not be any higher.

Once the maximum recoverable rent in July 1956 is ascertained by the formula laid down in section 15(b) of the ordinance, the rest is a matter of simple arithmetical calculation. It is not denied that the plaintiff paid $150 a month from 1st July, 1956 to 31st January, 1958. He thus paid $88.53 in excess for 19 months, making a total of $1,682.07. For the period 1st February, 1958 to 31st August, 1961, a period of 43 months, the plaintiff paid an excess of $98.53 *per mensem*, making a total of $4,236.79. He thus paid a total of $5,918.86 in excess of the maximum recoverable rent during the period 1st July 1956 to 31st August, 1961. Against this sum must be set off the sum of $1,721.16, being the rent payable by the plaintiff to the defendant from 1st September, 1961 to 31st December, 1963. There will therefore be judgment for the plaintiff for a sum of $4,197.70 and costs.

Judgment for the plaintiff.

Solicitors: *T. C. Tang & Co.*; *Donaldson & Burkinshaw*.

RAJAMONEY v. PONNIAH

[F.C. (Thomson L.P., Barakbah C.J., Tan Ah Tah J.) December 5, 1963]

[Ipoh — Federal Court Civil Appeal No. 52 of 1963]

Practice and Procedure—Application for Adjournment by defendant—Adjournment given subject to payment of costs—Costs not paid—Order made precluding defendant from defending—Whether such order valid—K.S.C. 1957, O.36 r.34.

Costs—Order for—Enforcement of, by precluding defendant from defending—Whether proper.

O.36 r.34 reads: "The Judge may, if he thinks it expedient for the interests of justice, postpone or adjourn a trial for such time, and to such place and upon such terms, if any, as he shall think fit."

Under the foregoing rule an order was made by the Judge that if the defendant, who had applied for an adjournment and whose application had been granted subject to his paying costs of the adjournment, failed to pay such costs, then he would be precluded from defending.

Held: (1) anything preventing a defendant from being heard is so contrary to the principles of natural justice as to require the most clear and explicit statutory justification. O.36 r.34 is not such a statutory provision and a defendant could not be precluded from defending under it;

(2) an order for costs may be enforced in a variety of ways. If it is to be enforced by precluding the defendant from defending, there must be express statutory provision to that effect. As no such statutory provision was referred to the Court the order of the Judge should be set aside.

FEDERAL COURT.

S. A. Lingam for the appellant.

P. P. Dharmananda (*N. H. Chan* with him) for the respondent.

Thomson, Lord President (delivering oral judgment): This is an appeal against a decision of Mr. Justice Ali Hassan.

There would seem to be a long and confused history of litigation between the parties which it is not necessary to examine here.

The course followed by the present proceedings was as follows.

On 26th July, 1962, the plaintiff in the High Court proceedings (who is the respondent to this appeal) issued a writ asking for a variety of reliefs in connection with certain premises. On 5th September the defendant, who was then legally represented, filed a defence. There would seem to have been a series of delays and ultimately the matter came on for hearing on 25th

July, 1963. By that time the defendant had ceased to be legally represented and he applied for an adjournment in order to obtain counsel. That application was resisted and in the event the judge made the following order:—

"I grant adjournment subject to defendant paying $250 costs by the 26th. In default defendant will be precluded from defending.

In event costs paid by defendant action adjourned to a date to be fixed by Registrar."

Some correspondence between the defendant and the plaintiff's solicitors then followed and ultimately the matter came into court again on 9th September when a submission was made to the judge and dealt with by him as stated in the following note:—

"Chan (plaintiff's solicitor) — Reports that defendant has not paid costs of adjournment as ordered.

Defendant is thereby precluded from defending."

It seems clear that that statement "Defendant is thereby precluded from defending" is a statement of the judge's decision. Thereupon the plaintiff's solicitor called the plaintiff who gave evidence and, somewhat curiously, was cross-examined by the defendant. No evidence was given by or on behalf of the defendant, presumably because the judge thought he was precluded from defending, and in the event judgment was entered for the plaintiff more or less as prayed.

Against that decision the defendant has now appealed on a variety of grounds.

Only one of these in my view calls for consideration and that is that the judge had no power to make the order he did make on 25th July that in default of payment of adjournment costs the defendant should be "precluded" from defending.

We are not concerned with the position in the subordinate courts where the rules of court are different from those in the High Court. In the High Court, however, the matter is dealt with by Order 36 rule 34 which reads as follows:—

"The Judge may, if he thinks it expedient for the interests of justice, postpone or adjourn a trial for such time, and to such place and upon such terms, if any, as he shall think fit."

There is a complete lack of English authority, so far as we have been able to advise ourselves, as to whether this rule would enable an order to be made which in terms would preclude a defendant from defending an action against him. Two Indian cases have been cited which have some bearing on the position, but the statute law in India is different from the law here and on that ground I do not think the Indian cases are of any great assistance.

My own view is that anything preventing a defendant (here we are concerned with a defendant and not a plaintiff) from being heard is so clearly contrary to the principles of natural justice as to require the most clear and explicit statutory justification and for myself I am unable to find such justification in the expression contained in Order 36 rule 34 "upon such terms.... as he shall think fit".

In any event an order for costs is like any other order of the court. It can be enforced in a variety of ways. It can be enforced by distress; it can be enforced by attachment; it can be enforced by bankruptcy proceedings. To say that making an order precluding a defendant from making his defence is an available method of enforcing an order for costs is something which I think can only be supported by the most express words in a statute. I have been shown no such express words and I would therefore allow this appeal with costs, set aside the judgment of the Court below and order a re-trial.

Barakbah C.J. and **Tan Ah Tah J.** concurred.

Re-trial ordered.

Solicitors: *S. A. Lingam*; *Dharmananda & Co.*

SYED ABDULLAH v. PUBLIC PROSECUTOR

[A.Cr.J. (Hashim J.) December 9, 1963]

[Kota Bharu — Criminal Appeal No. 45 of 1963]

Customs and Excise—Concerned in importing prohibited goods—Meaning of "is concerned"—Meaning of "import"—Whether conveying of goods across river comes within definition of import—Failure of prosecution to identify accused—Confiscation of prohibited goods—Customs Ordinance, 1952, ss. 2, 131(1)(a).

The appellant was charged under section 131(1)(a) of the Customs Ordinance for being concerned in the importation of prohibited goods namely 173 sacks of rice from Siam by boat across the river. The learned President convicted the appellant and sentenced him to a fine of $5,000 or 2 years imprisonment and ordered that the rice be confiscated. On appeal,

Held: (1) in this case the prosecution failed to prove beyond any reasonable doubt that the appellant was concerned in the importation of rice as he was not conclusively identified;

(2) as the evidence showed that an offence had been committed under the Ordinance the order of confiscation of the 173 sacks of rice and the boat confirmed.

Observations on the definition of "import" and the meaning of "is concerned" in the Customs Ordinance, 1952.

CRIMINAL APPEAL.

Wan Mustapha bin Haji Ali for the appellant.

Tengku Ahmad Rithauddeen (Deputy Public Prosecutor) for the respondent.

Hashim J.: In this case the appellant was charged in the Sessions Court, Pasir Mas, under section 131(1)(a) of the Customs Ordinance 1952 that he was concerned in importing prohibited goods namely one hundred and seventy three sacks of rice. The learned President found him guilty, convicted him and sentenced him to a fine